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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 00-96
	)	
	)	
Broadcast Signal Carriage Issues	)	

00-96

To: The Commission

COMMENTS OF BELLSOUTH CORPORATION AND BELLSOUTH ENTERTAINMENT, INC.

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SUMMARY

BellSouth Corporation and BellSouth Entertainment, Inc. (collectively "BellSouth") urge the Commission to implement the must-carry provisions of Section 338 of the SHVIA in a manner that recognizes the technological differences between cable and satellite technology, and takes into consideration the important differences between the statutory must-carry/compulsory license paradigms Congress has created for cable service and for direct-to-home satellite service ("DTH"). In addition, the Commission's rules should offer DTH providers significant flexibility and should heed Congress's intent that the Commission's DTH signal carriage rules not hamper the development of satellite technology, but rather promote full and fair competition between cable and DTH providers.

To those ends, BellSouth urges the Commission to adopt the following rules and policies:

- Subject to the requirements of Section 338(a), give DTH providers full discretion to choose where and when to carry or not to carry local broadcast signals in a particular designated market area ("DMA").

- Confirm that the Commission has discretion to choose, for any one or more DMAs, the Nielsen 1999-2000 DMA definition or any subsequently published definition, and to decide when to update DMA definitions and which subsequently published DMA definitions to use in any particular cases.

- Accord DTH providers maximum latitude and discretion in designating "local receive facility" sites.

- Adopt a more stringent definition of "substantial duplication" in the DTH context for commercial television stations; allow NCE must-carry stations to count toward the 4% public interest programming requirement; and, to promote cable/DTH parity, adopt a nationwide cap on the obligation of DTH providers to carry noncommercial educational ("NCE") stations.

- Unlike must-carry stations, reject requiring contiguous channel location for retransmission consent stations.

- Limit requirements to carry Vertical Blanking Interval ("VBI") information to closed captioning until the technical feasibility of other applications can be tested and agreed to on a case by case basis.

- Decline to adopt "material degradation" signal quality standards that would contravene Congress's mandate to not prohibit satellite carriers from using reasonable compression, reformatting, or similar technologies to meet their carriage obligations.

- Do not adopt a requirement for "dual carriage" of analog and digital television station signals.

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BellSouth Corporation and its subsidiary BellSouth Entertainment, Inc. (collectively, "BellSouth") hereby submit their comments in response to the Notice of Proposed Rulemaking (the "NPRM") in the above-captioned proceeding.[1/]

I. INTRODUCTION

BellSouth recently announced the signing of a long-term satellite service agreement with GE Americom that will allow BellSouth to provide a new direct-to-home satellite service ("DTH") beginning in the first quarter of 2001. BellSouth's DTH service will provide digital TV entertainment and interactive information to over 14 million households in its local telecommunications services markets (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee) and potentially 50 million households in neighboring states outside the southeastern United States. Thus, BellSouth has a direct and immediate interest in the broadcast signal carriage issues being considered in this proceeding.

1/ FCC 00-195 (rel. June 9, 2000).

II. COMMENTS

When Congress drafted the Satellite Home Viewer Improvement Act of 1999 (the "SHVIA") it was aware that, while cable television and DTH providers offer competing services, there are several significant differences in their technologies. Those differences are reflected in the SHVIA, which offers a compulsory license and must-carry scheme to better place DTH services on a competitive par with cable services, but which differs in important ways from the compulsory license and must-carry scheme applied to cable under Section 111(f) of the Copyright Act of 1976, as amended (the "Copyright Act")[2/] and Sections 614 and 615 of the Communications Act of 1934, as amended (the "Communications Act").[3/]

In its Conference Report on H.R. 1554, Congress recognized that "[b]ecause of unique technical challenges on satellite technology and constraints on the use of satellite spectrum, satellite carriers may initially be limited in their ability to deliver must-carry signals into multiple markets."[4/] The conferees urged the FCC "to not prohibit satellite carriers from using reasonable compression, reformatting, or similar technologies to meet their carriage obligations, consistent with existing authority."[5/] Further acknowledging the differences between cable and satellite, Congress called only for comparability between certain of the cable and DTH signal carriage rules. Thus, rather than dictating a mere replication of existing cable carriage requirements, the Conference Report on H.R. 1554 states that the FCC is to implement regulations "which are to impose obligations *comparable* to those imposed on cable systems under paragraphs (3) and (4)

2/ 17 U.S.C. § 111(f) (2000).
3/ 47 U.S.C. §§ 534 & 535 (2000).
4/ Conf. Rep. on H.R. 1554, 106th Cong. 2d Sess., at H11795 (1999) ("Conf. Rep.").
5/ Id.

of section 614(b) and paragraphs (1) and (2) of section 615(g), such as the requirement to carry a station's entire signal without additions or deletions."[6/]

The Commission should similarly recognize that the Part 76 signal carriage rules for cable were designed around the technology used by cable systems, and that the DTH signal carriage rules must be designed to fit the technology used by satellite carriers. It is important, therefore, that the signal carriage rules adopted in this proceeding provide for flexible local-into-local signal carriage requirements that reflect, among other things, the "unique technical challenges on satellite technology and constraints on the use of satellite spectrum [pursuant to which] satellite carriers may initially be limited in their ability to deliver must-carry signals into multiple markets."[7/] BellSouth urges the Commission to exercise care in crafting its signal carriage rules to ensure that DTH providers receive fair access to local television signals while, at the same time, avoiding the imposition of undue burdens that could inhibit growth and diversity of DTH and customer choice.

As further detailed below, BellSouth urges the Commission to adopt the following rules and policies:

- Subject to the requirements of Section 338(a), give DTH providers full discretion to choose where and when to carry or not to carry qualified local broadcast signals in a particular designated market area ("DMA").

- Confirm that the Commission has discretion to choose, for any one or more DMAs, the Nielsen 1999-2000 DMA definition or any subsequently published definition, and to decide when to update DMA definitions and which subsequently published DMA definitions to use in any particular cases.

- Accord DTH providers maximum latitude and discretion in designating "local receive facility" sites.

6/ Id. (Emphasis supplied).

7/ Id.

- Adopt a more stringent definition of "substantial duplication" in the DTH context for commercial television stations; allow NCE must-carry stations to count toward the 4% public interest programming requirement; and, to promote cable/DTH parity, adopt a nationwide cap on the obligation of DTH providers to carry noncommercial educational ("NCE") stations.

- Unlike must-carry stations, reject requiring contiguous channel location for retransmission consent stations.

- Limit requirements to carry Vertical Blanking Interval ("VBI") information to closed captioning until the technical feasibility of other applications can be tested and agreed to on a case by case basis.

- Decline to adopt "material degradation" signal quality standards that would contravene Congress's mandate to not prohibit satellite carriers from using reasonable compression, reformatting, or similar technologies to meet their carriage obligations.

- Do not adopt a requirement for "dual carriage" of analog and digital television station signals.

A. Carriage Obligations and Definitions

1. *The Differences in Bandwidth, Transponder Loading, and Related Technical Characteristics of Satellite Service Require That DTH Providers Have More Flexible Signal Carriage Rules Than Cable.*

The local signal carriage rules adopted by the Commission in this proceeding should be designed to ensure that DTH operators have unfettered discretion to choose where and when to carry local broadcast signals, subject only to the requirement of Section 338(a) that once one signal is carried pursuant to the compulsory license, the satellite operator carry all requesting signals. The bandwidth limitation inherent in the allocation of finite radio frequency spectrum to DTH[8/] and the disparate market segments served by DTH and cable represent the obvious, but

[8/] DTH satellites have 500 MHz of total available downlink capacity and 500 MHz of total available uplink capacity with which to serve satellite footprints that may be as large as full CONUS.

not the only, factors necessitating such flexibility in the Commission's DTH television signal carriage rules. Carriage of television signals on DTH satellite systems raises a number of considerations not faced by cable systems.

Technical requirements relating to efficient transponder usage on DTH systems make the process of adding and dropping television broadcast signals more challenging than on cable systems. Satellite channel capacity is divided into a number of discrete transponders. Only one uplink facility can be used to "feed" any one transponder. Thus, all signals that are to be "downlinked" by a transponder must originate from the same "uplink." Further, the compression ratio is limited by the size of the transponder. At some point, adding additional signals to a transponder can only be accomplished at the cost of materially degrading all signals carried by that transponder. If the effective capacity of a transponder is reached before all local television stations are added to that transponder, then the DTH provider must use the capacity of another transponder, which requires the provider to transport the extra local signals to the uplink location for that other transponder.

The available channel capacity of individual DTH networks will also vary according to the amount of bandwidth allocated to carry individual channels. For example, the amount of allocated bandwidth will depend on a number of factors, such as the amount of bandwidth needed to prevent rain fade. Because DTH providers will want to offer service in areas that experience frequent or heavy rain fall (such as Florida and the Pacific Northwest), the amount of bandwidth allocated to each signal must be increased to offset the effects of rain fade in such markets, whereas comparable signal quality can be achieved using less bandwidth in markets less susceptible to rain.

In addition, because digital satellite signals are transported using Quaternary Phase Shift Keying (QPSK) modulation, rather than the Quadrature Amplitude Modulation (QAM) technique used for cable, DTH derives fewer usable channels than cable from the same amount of bandwidth. This requires DTH operators to more carefully plan use of channel capacity within their allotted spectrum.

The channel capacity challenges faced by DTH operators are even more pronounced because of the size of the DTH service area. Cable operators generally need to be concerned only with having sufficient additional channel capacity to carry the broadcast stations licensed to a single market and, on top of that, are afforded capacity protection by channel capacity caps. DTH operators are faced with local signal carriage requests nationwide, are not afforded capacity caps, and must route local signals cross country to a central uplink site or sites.

Accordingly, the Commission should fashion its signal carriage rules for DTH service to give the DTH providers discretion and flexibility to decide if, when and for how long to carry local signals in a given market, subject only to the requirements of Section 338(a) of the Act. Specific signal carriage procedures to accomplish this objective are discussed below.

2. *Local Signal Carriage Procedures*

(a) *DTH Providers Generally Should Control the Start and the Length of the Initial Election Process, Subject to Certain Minimum Notice Requirements.*

Because providing local-into-local service is entirely up to the DTH provider, the time for commencement of the initial carriage election process for television stations should be decided by the DTH provider as well. To allow stations sufficient time to decide between must-carry and retransmission consent, BellSouth suggests that the minimum notice period by a DTH provider

to local stations be 60 days. This parallels the requirements of Rule 76.64(l) for notice by a cable system to television stations of the commencement of service by the cable system.

Following the cable rules, the DTH provider would start the process by giving notice of intent to carry local signals into the market to all potentially eligible stations. The notice should include the proposed tentative launch date (not to be less than 60 days from notice) and the proposed location of the market's signal collection point.[9/] The stations should then have 30 days to respond to the notice. The station's response should be required to state whether the station elects must-carry or retransmission consent and whether it objects to the location of the signal collection point if it is proposed for a location outside of the market. Absent a response, the station would be deemed to have elected must-carry status (as in cable Rule 76.64(l)), and to have consented to the out-of-market signal collection point designated in the DTH provider's notice.

(b) *Commencement of the Notice Process Should Not Bind the DTH Provider to Provide Local-into-Local Service in a Market.*

The DTH provider's notice of intent must be considered conditional. This conclusion is supported by the plain language of Section 338, which states that a DTH provider is not bound to carry local television station signals into a local market until the provider carries its first television station into the local market. Practical considerations also support this conclusion. Legitimate channel capacity concerns may arise depending on the number of requests for carriage by other stations in the market, and may require the DTH service provider to withdraw its notice.[10/] Conversely, a DTH provider may not want to go forward if it cannot get must-carry

[9/] Section 338(h) refers to this point as a "reception point."

[10/] See, discussion, *supra*, § II.A.1, at pp. 4-6.

or retransmission consent commitments from enough television stations to form a "critical mass" that would make the local station tier attractive to subscribers.

Given that Congress's intent reflected in Section 338 is that the DTH provider decides whether to provide local stations to a market, it is reasonable to conclude that the DTH provider should be entitled to know the final carriage obligations and their economic consequences in a local market before being committed. Moreover, the inability to withdraw a notice of intent in these circumstances would give local television stations undue and inappropriate negotiation power, thus potentially discouraging DTH providers from offering local-into-local service. Finally, this approach mirrors business transactions in an unregulated free market, where no party to a negotiation has to make a binding commitment until a final document is executed by all parties. Such a result also engenders a "least regulatory" process.

(c) *A Three-Year Must-Carry or Retransmission Consent Period Is Appropriate for DTH.*

To the extent possible, cable's three-year election period should be used for DTH signal carriage. A common three-year election period applicable to all stations that have previously started DTH carriage into their local markets is necessary to prevent discrimination between DTH providers and cable operators and among DTH providers. Of course, DTH providers will generally start local carriage of stations within, rather than at the beginning of, an election period. Accordingly, the station's "mid-period" election for a local market should expire at the end of the next generally applicable three-year period. BellSouth suggests an exception when less than a year remains in the generally applicable three-year period at the time when a station is first carried. In this instance, to avoid repetitive negotiations and disruption to viewers, the station's election should continue until the end of the next three-year election period. BellSouth

sees no reason why a market in which carriage has commenced cannot follow the cable process for the renewal of elections; that is, local stations must notify the DTH provider by October 1 of their elections to commence January 1 of the following year.

(d) *The Commission Should Require Appropriate Time Periods For Commencing Carriage of Requesting Stations After the DTH Provider Commences Local-into-Local Service in a Market Under the Compulsory License.*

The date for commencement of carriage of local television signals into a market should vary based upon circumstances. Carriage of stations that have elected, or are deemed to have elected, must-carry in a market should generally begin within three months of the time that a DTH provider carries the first local signal into that market. If the election or deemed election is within the three-month period, the time for carriage should begin within three months of that time.

In each case, the proposed three-month time period assumes that the carriage commencement process proceeds without unusual complications, with the good faith cooperation of the parties and without interference from sources or circumstances outside of the DTH provider's control.[11/] Delays or problems encountered by one or more stations, or forces outside of the DTH provider's control, that contribute to a delay in carriage should excuse the DTH provider's failure to commence carriage of local signals within three months of its carriage of the first local signal. At times the satisfactory negotiation of necessary logistics, such as, for

11/ Similarly, matters outside of the DTH provider's control which cause the loss of a television station signal being carried by the provider to its local market should not result in a requirement that the DTH provider cease carrying local stations to the market. Nor should a "good faith" dispute whereby a station is dropped from the line-up result in a requirement that the DTH provider cease local-into-local service to the market. In either of those cases, consumers should not be held hostage to the results of accidents or disputes between the provider and a broadcaster. Such disputes should be resolved by the use of appropriate procedures with minimal disruption to the local-into-local service provided by the DTH operator.

example, transporting a station signal to the local collection point and completing testing of signal quality, may not be completed during the three-month period due to the complexity of the problem or the failure of stations to assist in the process. In such instances, as well, the DTH provider should be excused from meeting the three-month deadline.

If a non-market collection point is proposed, the three-month period should begin after the DTH provider has had a chance to negotiate the location of the collection point, determine how the signals will be delivered to the collection point and resolve other relevant logistical matters.

3. *The Signal Carriage Rules Should Be Designed to Foster a Level Playing Field Among DTH Providers and Between DTH Providers and Cable Providers.*

The Commission should endeavor to foster a level playing field between competing DTH providers, and between DTH providers and cable operators, in obtaining local signal carriage rights. As noted by the Commission, "[t]he SHVIA generally seeks to place satellite carriers on an equal footing with cable operators regarding the provision of local broadcast programming, and thus give consumers more competitive options in selecting a multichannel video programming distributor ('MVPD')."[12/] To that end, the Commission should adopt rules requiring television stations to act fairly and reasonably in their dealings with DTH providers. For example, if DirectTV carries WXIA, Channel 11, in Atlanta, Georgia, pursuant to must-carry, Echostar and BellSouth should also be entitled to consider WXIA a must-carry station as well. Absent this requirement, larger DTH companies will obtain competitive advantages based on more favorable access to programming. Moreover, such a fair treatment requirement would

12/ NPRM, ¶2.

mirror cable rule 76.64(g) and reflect Congress's intent that the DTH and cable carriage rules be comparable where appropriate.[13/]

B. Market Definitions

1. *General.*

Section 338(a)'s carriage obligations apply to discrete "local markets." Subsection 338(h)(3) defines the term "local market" as having the same meaning given that term by Section 122(j) of the Copyright Act. Under that section, a market is defined as the designated market area in which a station is located, and (i) for commercial television stations, all commercial television stations licensed to a community "within the same designated market are within the same local market", and (ii) for noncommercial educational television stations, the market includes any station "licensed to a community within the same designated market area as the noncommercial educational television broadcast station." A designated market area is further defined as including the market area as determined by Nielsen Media Research, and included in their 1999-2000 or successor publications, as provided in 17 U.S.C. § 122(j)(2)(B).

The NPRM seeks comment on the basis for including clauses (i) and (ii) in Subsection 122(j). Those clauses introduce the concept of "community of license" in determining a station's local market. This method of defining a station's market is markedly different from the method used for the cable compulsory license in Section 111(f) of the Copyright Act, which refers to the "local service area" of a station and allows the Commission to define this area for both the compulsory license and must-carry rights. Pursuant to Section 111(f), the Commission has defined those areas with respect to a station's attributes other than the station's community of

[13/] Section 76.64(g) provides: "If one or more franchise areas served by a cable system overlap into one or more franchise areas served by another cable system, television stations are required to make the same election for both cable systems."

license, such as the location of the Grade B contour and the location of the station's transmitter. Section 122(j) of the Copyright Act does not authorize the Commission to use any characteristics of a station to determine its local-into-local carriage rights other than the location of the station's community of license.

The NPRM further seeks comment on whether the Commission has the authority to implement a market modification mechanism similar to Section 614(h)(1)(C), which includes procedures for either a television station or a cable operator to request changes in a market.[14/] As explained above, the must-carry and compulsory license schemes applicable in the cable and satellite context have certain fundamental differences. In the case of satellite, the interpretation of Section 122(j) of the Copyright Act is central to this issue.

In that regard, Section 122(j) absolutely limits a station's satellite must-carry rights to the DMA that includes its community of license. Under Section 122(j), that is the necessary requirement for carriage. Other factors, such as viewing patterns, local programming and station technical coverage which are relevant to a Section 614(h)(1)(C) market modification decision, are not a part of Section 122(j) and cannot be used to give a station must-carry rights in a market if the station's community of license is not in the applicable DMA.

That is not to say that the Commission lacks all discretion in this area. But, BellSouth interprets the statute to provide this discretion only in the definition of any particular DMA. Under Section 122(j)(2)(C), the Commission is constrained to use "the Nielsen 1999-2000 data or any successor publication." BellSouth interprets the quoted clause to allow the Commission, along with the Copyright Office, the discretion to choose, for any one or more DMAs, the Nielsen 1999-2000 DMA definition or any subsequently published definition of the DMA.

[14/] NPRM, ¶ 16.

Thus, the Commission might use the Nielsen 1999-2000 DMA definition for Atlanta during calendar year 2005, but use the Nielsen 2003-2004 DMA definition for Birmingham during calendar year 2005. BellSouth bases that conclusion, first, upon a plain reading of the quoted words. Congress did not say that the Nielsen 1999-2000 DMA data, as amended, must be used. Instead, Congress used the word "or" indicating a choice and, for "successor publications," it used the word "any," reflecting the breadth of choice explained above. Moreover, this interpretation avoids possible absurd results and, thus, is a proper exercise of statutory construction.[15/] For example, Nielsen will cease defining an area as a DMA in subsequent publications if the television stations in the DMA do not provide Nielsen sufficient financial support, even though the area deserves a DMA treatment. That result would be more likely to occur in smaller DMAs where a diversity of voices may be lacking. If Section 122 were interpreted, however, to require the Commission to use the Nielsen DMA definitions, "as amended," this result could occur. BellSouth's interpretation, on the other hand, would allow the Commission to avoid this perverse result.

Finally, the NPRM requests comment on how frequently the Commission should incorporate changes in a DMA. As explained earlier in these comments, requiring DTH providers to add new local-into-local signals to an existing complement of signals may not be technically or practically feasible. For example, transponder capacity limitations may require the use of a new, adjacent transponder for this purpose.[16/] To access the transponder, the DTH provider may have to transport television signals added to a DMA large distances to the uplink

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15/ *Horn v. C.I.R.*, 968 F.2d 1229, 1239 (D.C. Cir. 1992).

16/ See, discussion, *supra*, §II.A.1, at p. 4.

dedicated to that transponder.[17/] Because DMA changes can have these kinds of effects, BellSouth urges the Commission to opt for a more lengthy time period between DMA updates.

BellSouth suggests that at a minimum, at least initially, a five-year interval should be chosen. Over time and with experience, the Commission can consider increasing or decreasing the interval. Further, so that the effects of updates can be known and, to the extent detrimental, ameliorated, DMAs should not be updated until after a notice and comment process is completed, a process that will allow the Commission, television stations, DTH providers and the public an opportunity to consider the effects of proposed DMA updates and to ensure that those updates would serve the public interest.[18/] In any event, it is imperative that the Copyright Office and the Commission use the same Nielsen data and coordinate use of identical local market definitions. Otherwise, a satellite service provider might be placed in the anomalous position of being required to carry a station in an area for which it has no compulsory license.

2. *Procedures for New Stations and for Changes of a Station's Community of License.*

The Commission should also adopt procedures in the event that a television station commences operation in a market or has its community of license changed to a market that already is receiving local-into-local DTH. BellSouth is concerned that stations licensed to communities bordering a DMA will employ Commission procedures to change their

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17/ Cable systems, by contrast, can add, delete and replace signals with relative ease and at relatively little expense.

18/ The DTH compulsory license uses the same DMA to define the area within which a local station may be provided to a DTH provider's subscribers. In the event that a change in a DMA would delete a carried station from a DMA by deleting the county that includes its community of license, DTH providers must be free to immediately cease carriage of such station to avoid any possibility of copyright liability.

communities of license to gain entry to the DMA for the purpose of obtaining DTH carriage. There is a legitimate concern that a station would change its community of license primarily to gain the wide area satellite system coverage. Such a result is detrimental to DTH providers who may develop transponder capacity or transport cost problems as a result of such a change. BellSouth suggests that the Commission address this problem by conditioning any change in the community of license of a station so that either (i) the carriage of that station by DTH providers is at the option of the DTH provider or (ii) the station is deemed to have elected retransmission consent for the balance of the applicable election period. Further, a station changing its community of license should be required to bear the costs associated with carrying its signal to any out-of-market signal collection point that may be in use, or for which the consent of other stations has been given.

C. Broadcast Station Delivery of a Good Quality Signal

Section 338(b)(1) requires that television station broadcasters bear the costs associated with delivery of their signal to the satellite operator's "local receive facility" or to its non-local receive facility provided the latter location is agreed to by at least 50% of the television stations in the local market. This section of the Act reflects Congressional intent to provide flexibility to the satellite operator to choose the receive facility location. The technical configurations for local station uplink and distribution that may be required by satellite operators can be expected to vary greatly from market to market. Locating reception points is a part of the "unique technical challenges on satellite technology" recognized by Congress as requiring that DTH providers be given reasonable flexibility in configuring their systems.[19/] The Commission itself acknowledges that the most feasible means available to DTH providers to collect broadcast

19/ Conf. Rep., at. H11795.

signals from television markets nationwide is likely to be to strategically aggregate signals on a regional basis.[20/] Therefore, satellite operators should be given maximum latitude and discretion, as envisioned by Section 338(b)(1), to designate either an in-market or out-of-market reception point.

1. *Promoting Reasonable, Good Faith Efforts in the Public Interest to Establish Signal Collection Points.*

BellSouth supports the Commission's suggestion in Paragraph 19 of the NPRM that a satellite operator may establish regional receive facilities encompassing several DMAs. The Commission's further inquiry in that paragraph as to the process whereby television stations and satellite operators agree to a signal collection location in another city, and procedures in the event of disagreement, inherently involves fundamental questions of fairness both to the satellite operator and to the stations involved. Clearly, it should be the expectation that the parties negotiate in good faith, and rules and policies to that effect should be adopted.

Certain of the rules recently adopted by the Commission to promote good faith negotiation of retransmission consent agreements under Section 325 of the Communications Act could serve as a model for such a requirement. First, as in Rule 76.65, the Commission should adopt a good faith negotiation requirement that includes a two-part test for good faith. The first part of the test would consist of an objective list of negotiation standards. The second part of the test would allow the DTH provider to prove the existence of bad faith based upon a totality of the circumstances. Under the first part of the test, the following Rule 76.65 objective standards would apply:

(1) a television station would be prohibited from refusing to negotiate with a DTH provider concerning an out-of-market signal collection point.

[20/] NPRM, ¶18.

(2) a television station would be required to appoint a negotiating representative with authority to bargain on signal collection point issues.

(3) a television station would be required to meet at reasonable times and locations and not to act in a manner that would unduly delay the course of negotiations.

(4) a television station, in responding to an out-of-market signal collection point proposal, would be required to provide considered reasons for rejecting any aspects of the proposal.

(5) a television station would be prohibited from entering into an agreement with any other broadcasters in the market requiring any one of them to vote against a DTH provider's out-of-market signal collection point proposal.[21/]

The second part of the good faith test would be the "totality of the circumstances standard" applicable to retransmission consent negotiations under Rule 76.65. Under this standard, a DTH provider would be able to present facts to the Commission which, even though they do not allege a violation of the specific standards enumerated above, constitute a failure to negotiate in good faith given the totality of the circumstances.

BellSouth also urges the Commission to adopt rules prohibiting local television stations from unreasonably withholding consent to a regional receive facility location. To that end:

(1) a station should be deemed to have given consent to an out-of-market reception point if it does not notify the satellite provider in writing within 30 days of the satellite provider's notice of intent to carry that the station votes against the receive location.

(2) as indicated above, a station should be required to include in its notice detailed and material reasons for the station's election to vote against the proposed point. To ensure obeisance of this good faith requirement, absent a sufficient specification of reasons, the station should be deemed to have unreasonably withheld its consent to the location of the receive facility.

(3) stations should be deemed to have voted in favor of the satellite carrier's proposed receive facility location if the satellite provider has agreed to transport the station's signal to that location without additional cost to the

21/ The Commission has adopted similar good faith negotiation standards in other contexts. *See, e.g.*, 47 CFR § 51.301.

station, or demonstrates using established criteria that a sufficient quality off-the-air signal will be received at that location.

In the event of a disagreement not resolved by "good faith" negotiations, a complaining party will need an avenue to bring the matter before the Commission. Rules similar to those found in Sections 76.6 and 76.7 applicable to disputes between television stations and cable systems should be adopted to provide a means to resolve such disputes. BellSouth suggests that stations bear the burden of proof as to the reasonableness of their oppositions to proposed receive facility locations. The emphasis of Commission rules and policies, however, should be on a negotiated resolution between the parties consistent with Section 338 of the Act.

2. *Promoting Reasonable Efforts in the Public Interest to Allow for the Change or Consolidation of Signal Collection Points.*

The Commission should recognize that DTH providers will likely need to change or consolidate signal collection points over the course of time. Section 338 leaves to the satellite provider the discretion to select signal collection points, subject only to objection by the majority of the local television stations in a DMA to a location outside the DMA. But, to protect the legitimate interests of stations, and to avoid service disruption, BellSouth suggests a 90-day notice period before a satellite provider moves a collection point. The DTH provider should be able to accelerate this time period in the event that circumstances develop that would require a more rapid abandonment of the existing reception point or would cause the DTH provider to bear a substantially increased cost to continue using the existing reception point during this 90-day relocation period. In all other respects, the procedures for changing a point should be the same as those for establishing an initial out-of-market point.

3. *Status of Stations Voting in the Minority Against an Out-of-Market Signal Collection Point.*

The Commission's rules should provide that television stations in the dissenting minority of a vote to allow an out-of-market collection point may be denied carriage by the DTH provider unless such stations deliver a good quality signal to the out-of-market reception point. We believe Section 338 as well as common sense dictates this result. Certainly, a satellite operator cannot be expected to provide multiple receive locations for different stations in a local market. Otherwise, local stations will not be carried at all, as satellite operators will be forced to exercise their option not to provide any local television station signals in markets where dissenters are able to prevail with complaints as to the location of the receive point.

4. *Definition of "Good Quality" Signal.*

With respect to the definition of "good quality" signal,[22/] BellSouth supports the definition (and testing procedures) traditionally used to define the quality of signal to be delivered to a cable headend by a local television station.[23/] Since those signal quality standards have been effective in the cable environment, there is no reason they will not work for satellite. The Commission's rules should provide that the failure to deliver such a signal, as in the cable rules, would result in denial of carriage. Finally, the Commission's rules should mirror the requirements of Section 338(b)(1) pursuant to which a television station asserting its rights to carriage "shall be required to bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier or to another facility that is acceptable to at least one-half the stations asserting the right to carriage in the local market."

22/ NPRM, ¶20.

23/ 47 U.S.C. § 534(h)(1)(B)(iii); 47 C.F.R. §76.55(c)(3).

D. Duplicating Signals

1. *Commercial Television Stations*

Subsection 338(c)(1) states that a satellite provider does not have to carry the signal of any local commercial television station that "substantially duplicates" the signal of any other station carried in the same local market by the satellite provider, or to carry within a local market more than one station affiliated with a particular network unless the stations are licensed to communities in different states. The NPRM asks whether the definition of "substantial duplication," as applied in the context of cable carriage, should be applied in the satellite context.[24/]

Given that a satellite provider will have to carry every eligible station in an area as large as a DMA, the need to avoid providing duplicate signals is vastly more important in the satellite context than the cable context. Carriage of duplicating signals will cause DTH providers to suffer severe capacity limitations without the benefit of the caps enjoyed by cable on the number of stations that must be carried to a market. Thus, BellSouth believes that expanding the breadth of the rule as applied to DTH will better enable DTH providers to enter local markets with local-into-local signals.

It is important to recognize that cable systems enjoy caps on must-carry signals, and that the market for a cable system is generally much smaller than the DMA market applied under SHVIA to satellite providers. Moreover, while the large service area technology of satellites offers beneficial efficiencies for the provision of a given signal or signals to all viewers in the service area, this same technology is less efficient than cable in carrying local signals into numerous smaller local markets. Thus, to promote the public interest in multichannel video

[24/] NPRM, ¶24.

competition, viewers' choices and the preservation of local broadcasting, BellSouth believes that the definition of "substantial duplication" applicable to commercial television stations carried by satellites should be more narrow than that applicable to commercial television stations carried by cable. In that regard, BellSouth proposes that the Commission adopt a 30 percent standard in lieu of the 50 percent standard used for cable.

The NPRM also asks for guidance in defining when a station is "affiliated with a particular television network."[25/] For purposes of defining a television network, the definition in Section 339(d) of the Communications Act is acceptable (*i.e.*, interconnected program service for 15 hours or more each week to at least 25 affiliated broadcast stations in 10 or more states).

2. Noncommercial Television Stations.

The NPRM also requests comments on the obligation of DTH providers to carry noncommercial stations under the limits prescribed by SHVIA. Specifically, subsection 338(c)(2) directs the Commission to:

> prescribe regulations limiting the carriage requirements under subsection (a) of satellite carriers with respect to the carriage of multiple local noncommercial television broadcast stations. To the extent possible, such regulations shall provide the same degree of carriage by satellite carriers of such multiple stations as provided by cable systems under section 615. (Emphasis supplied.)

Section 615 (1) limits the number of NCE stations a system is required to carry, and (2) defines those NCE stations that are "qualified" for carriage. With certain exceptions, discussed below, the section 615 limits can be extended to the carriage of NCE stations by satellite providers.

BellSouth supports use of the definition of qualified local NCE station set forth in Rule 76.55(b) for satellite carriage purposes, but believes that definition must be adapted to fit the

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25/ NPRM, ¶25.

statutory scheme of SHVIA. Noncommercial stations not meeting this modified definition should not be eligible for carriage. To adapt this definition to SHVIA, certain changes to it must be made. First, Rule 76.55(b)'s reliance upon the location of the station's transmitter or its Grade B contour relative to the "headend" is not meaningful to determining eligibility qualifications for satellite must-carry. Therefore, these factors should not be applied in the DTH context. In fact, the "headend," or signal collection point in the satellite context, may not be anywhere near the station's physical location or Grade B contour location. Further, while a translator of a noncommercial station may be eligible for cable carriage under Rule 76.55(b), the carriage obligations under SHVIA do not extend to translator stations.[26/] Also, for purposes of satellite carriage rights, the station must be licensed to a community that is within the local DMA. Otherwise, the satellite provider cannot employ the Section 122 compulsory license to carry the station to the intended DMA.

The nature of the compulsory license provided under Section 122 also means that a satellite provider cannot be required to carry an NCE station that is not "local." While a cable system can carry a non-local NCE station in satisfaction of its section 615 requirements and obtain a section 111 compulsory license for that carriage, the compulsory license for satellite providers is not available to carry to a DMA any station that is licensed to a community outside of the DMA.

Mirroring the cable rules (Section 76.56) by requiring satellite providers with over 36

[26/] Section 338(a) limits DTH must-carry rights to the "television broadcast station." Section 338(h)(7) defines the term, television broadcast station, as having the meaning given such term in Section 325(b)(7). As correctly noted by the Commission, that definition excludes translator stations. NPRM, ¶12.

useable channels to carry "all qualified local NCE television stations requesting carriage but in any event at least three such signals" (or non-local NCE signals) would be inappropriate for a number of reasons. First, the Commission is directed by Subsection 338(c)(2) to promulgate "limits" on the Subsection 338(a) carriage obligations. Mandating a minimum number of NCE signals would not be a limitation, but an additional affirmative requirement not provided for in Section 338(a). Second, as explained above, satellite providers have no compulsory license whereby they can tap non-local NCE stations to meet such a requirement. In effect, such a requirement would mandate a violation of copyright law.

Third, satellite providers already have a significant carriage burden given their available channel capacity. Carriage of each additional NCE station from a major local market requires the DTH provider to set aside equivalent bandwidth throughout all or much of its system, seriously compromising efficient use of scarce spectrum and the DTH provider's ability to provide local-into-local service in other markets.

It is with this understanding that BellSouth believes that Section 338(c)(2) directs the Commission not to promulgate DTH NCE station carriage rules that are the same as the cable NCE station carriage rule. Rather, Section 338(C)(2) looks to the Commission to develop a DTH rule that provides "the same *degree* of carriage by satellite carriers of such multiple stations as provided by cable systems under section 615."[27/] Congress, as reflected in the NPRM and the SHVIA legislative history, was mindful of the technical differences between cable and DTH carriage. It is, thus, apparent that Congress deliberately chose the word "degree" understanding that more than simply adapting cable's NCE station carriage rules to DTH would be required to create parity between cable and DTH signal carriage burdens. Thus, BellSouth believes that

27/ Section 338(c)(2). (Emphasis supplied).

more stringent limitations on DTH NCE station carriage obligations is both warranted and expected. An appropriate national cap on the number of NCE stations a DTH provider would be required to carry would recognize Congressional concerns as to the technological differences between cable and DTH, and provide the graduated carriage burden equivalency that Congress seeks. Thus, the degree to which mandatory NCE station carriage requirements burden the DTH provider's total satellite capacity should be no greater than the degree to which mandatory NCE station carriage requirements burden the total channel capacity of an individual cable system.

Finally, the Commission should make clear that mandatory NCE signal carriage will be considered "exclusively noncommercial programming of an educational nature" under the 4 percent channel capacity reservation requirements of 47 U.S.C. § 335.

E. Channel Positioning

The Commission should not require contiguous channel location for retransmission consent stations. The very nature of retransmission consent is a consensual, unregulated, agreement between the parties. If a station chooses to negotiate (i.e., elect retransmission consent) rather than take advantage of its free carriage rights (i.e., must-carry), the station should not have any Commission-imposed advantage. Channel positioning should be negotiated along with any other provision of agreed-to carriage.

F. Content to be Carried

The NPRM asks whether the criteria for "program related material" set forth in *WGN Continental Broadcasting v. United Video, Inc.* should apply in the context of satellite signal carriage. So long as technically feasible, BellSouth has no objection to use of the WGN criteria. However, the criteria for "nominal costs, additions, or changes in equipment" used in the determination of "technically feasible" must be reasonable and truly nominal. The historical

costs experienced by cable operators will bear little or no relationship to those incurred by satellite operators. Thus, satellite operators will be carrying a large number of television stations over a wide geographical area and should not be saddled with prohibitive and burdensome costs to accommodate a local station's Vertical Blanking Interval ("VBI") content.

A requirement for VBI passthrough of content other than closed captioning over BellSouth's DTH system likely would not meet the technically feasible standard. Use of the VBI for closed captioning is accomplished in BellSouth's current platform by decoding the closed captioning information, transmitting it with other data, decoding it in the set-top-box and re-creating the closed captioning signal on a new line 21 generated inside the set-top-box. This requires special software and hardware in the headend and in the set-top-box. The closed captioning can be viewed because it starts out as data and uses a predetermined standard that BellSouth's headend encoding equipment and the set-top-boxes are designed to process as data. Use of the VBI for many other types of signals, however, may be based on other standards or, in some cases, no standard. (*e.g.*, color bars, multiburst, Vertical Interval Reference Signal ("VIRS"), Ghost Canceling Reference Signal ("GCRS"), etc.). The modifications to the DTH provider's platform required to accommodate such multiple standard and non-standard signals may not be technically or economically feasible.

G. Material Degradation

BellSouth is committed to providing superior signal quality over its DTH system. Indeed, one of the selling points of DTH has been its superior signal quality. But to mandate signal quality standards is to run the significant risk that the Commission will in effect freeze technology. Indeed, Congress recognizes this danger. The Commission declined to adopt digital

cable signal quality standards for just this reason, as noted in the NPRM.[28/] At this juncture of the early development of digital transmission techniques, any signal standard restrictions could substantially retard the current rapid pace of technological development. Having declined to adopt signal quality standards for digital cable – which is a market dominant service – it would make little sense for the Commission to adopt such standards in the context of the robust competition of DTH where high signal quality is an important factor in a DTH provider's ability to compete. Finally, as recognized by Congress, imposition of any technical limitations can be especially detrimental to DTH providers. In Section 338, the Conference Committee noted the "unique technical challenges on satellite technology and constraints on the use of satellite spectrum" in urging the Commission not to prohibit satellite providers from "using reasonable compression, reformatting, or similar technologies to meet their carriage obligations...."[29/] Inappropriate signal standards would violate that exhortation.

If the Commission determines that there is a basis for genuine concern with digital satellite carriage, then BellSouth urges the Commission first to develop a conclusive record before it creates rules that could limit innovation and experimentation and violate Congressional intent. To that end, a Federal advisory committee could be established to study and report to the Commission on the issues involved.

H. Digital Television

Section 338(g) directs the Commission to promulgate regulations comparable to those applied to cable under Section 614(b)(4), which requires the Commission to develop a must-

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28/ NPRM, ¶37.

29/ Conf. Rep. at H11795.

carry regime for stations that convert their signal from analog to digital modulation. The NPRM seeks comment on whether satellite providers should be required to carry both the analog and DTV signals of stations until such time as television stations return their analog channel allocations to the Commission.[30/]

BellSouth is strongly opposed to any such dual carriage requirement for DTH. As stated by the Commission in its Docket 98-120 concerning DTV carriage obligations of cable systems:

> We recognize that the most difficult issues arise during the transition because there will exist, for a temporary period, approximately twice as many stations as are now in operation or will be in operation after the transition and the return of the analog station licenses. Toward the end of the period, there will be an increasing redundancy of basic content between the analog and digital stations as the Commission's simulcasting requirements become applicable. These two developments have broad implications for the cable industry. To the extent that the Commission imposes a digital must-carry requirement, cable operators could be required to carry double the amount of television stations, that will eventually carry identical content, while having to drop various and varied cable programming services where channel capacity is limited.

Digital Broadcast Signal Carriage Issues, 13 FCC Rcd 15092, 15113 (¶ 39) (1998) (emphasis supplied). This unnecessary waste of spectrum resources would be especially injurious to satellite providers, given their limited amount of available spectrum, and would involve the substantial duplication of signals contrary to Congressional intent.[31/] If dual analog/digital carriage were to be required, it would mean that DTH providers would have to free up capacity

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30/ NPRM, ¶48.

31/ Even in the cable context (Docket 98-120), numerous commentators have raised serious issues as to the feasibility of DTV must carry, as well as Constitutional and statutory objections to carrying more than the primary broadcast signal. We urge the Commission to consider those comments in this proceeding and to recognize that such a dual carriage requirement would be far more difficult for satellite carriers than for cable operators. BellSouth reserves judgment on the constitutionality of the must-carry requirements of SHVIA.

by decreasing the number of markets receiving local-into-local service. This would have a negative effect on the public interest by curtailing service to smaller markets.

III. CONCLUSION

For all of the foregoing reasons, BellSouth requests that the Commission adopt signal carriage rules and policies consistent with these comments.

Respectfully submitted,

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